SUPREME COURT, U.S.
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(4)

No. 87-1467

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

Of Counsel:
W. J. MCANELLY, JR.
EDWARD DE LA GARZA
Exxon Company, U.S.A.
800 Bell Street
Houston, Texas 77002

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KEITH A. JONES *
ROBERT A. BURGOYNE
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

J. RUFUS WALLINGFORD
C. MARK BAKER
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a federal court sitting in diversity should consider and apply relevant post-judgment developments in state law that are brought to its attention while the diversity case remains *sub judice*.*

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* Petitioner Exxon Company, U.S.A., is a division of Exxon Corporation, whose affiliates and partially owned subsidiaries are listed in Pet. App. H.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 65-76) is reported at 828 F.2d 1121. The opinion of the district court (J.A. 56-61) is not officially reported but is reprinted at 828 F.2d 1127.

JURISDICTION

The judgment of the court of appeals (J.A. 77) was entered on October 8, 1987. A timely petition for rehearing was denied on December 8, 1987 (J.A. 78). The petition for a writ of certiorari was filed on March 4,

1988, and granted on April 25, 1988. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE, AND RULES INVOLVED

The relevant provisions of the First, Fifth, and Fourteenth Amendments to the United States Constitution, of the Rules of Decision Act, 28 U.S.C. § 1652 (1982), and of Rules 90 and 114 of the Texas Rules of Appellate Procedure are set forth in Appendix A, *infra*.

STATEMENT

1. This case arises out of a dispute over the proper construction, under Texas law, of an "irrevocable standby letter of credit," J.A. 66, issued by respondent Banque de Paris et des Pays-Bas ("Paribas") for the benefit of petitioner Exxon Company, U.S.A. ("Exxon"). The nature and function of letters of credit, and in particular of so-called "standby" or "guaranty" letters of credit, were described by the Texas Supreme Court in *Republic National Bank v. Northwest National Bank*, 578 S.W.2d 109, 112-13 (Tex. 1978):

> Generally, a true letter of credit is the third contract in a complex of three independent contracts. The first contract is the agreement between parties to the underlying obligation; typically, this is the contract between the obligor and obligee. The second contract is ordinarily between the bank or other person (the issuer) and the obligor (the account party), which precipitates the issuance of the letter of credit. The third contract, or the letter of credit, is between the issuer and the obligee (the beneficiary), which provides that the issuer will make payment to the beneficiary upon the presentation of a draft and certain documents (a documentary draft) or simply upon presentation of a draft (a clean letter) . . . .
>
> . . . One particular development has been the "standby credit" or "guaranty credit" whereby the

> issuer agrees to pay the beneficiary upon presentment of documentation indicating that the account party has defaulted on a payment obligation. Distinguished from the traditional credit, the standby credit is used primarily to finance or secure an underlying intangible or money indebtedness undertaken by the account party such as a promissory note.

The standby letter of credit in this case was issued by Paribas to secure the obligation of Houston Oil & Refining, Inc. ("Houston Oil"), to deliver 558,000 barrels of crude oil to Exxon.

2. In July, 1981, Exxon "had closed part of one of its refineries for maintenance and therefore had a surplus of crude oil." J.A. 66. To deal with this temporary surplus, Exxon entered into a contract with Houston Oil to make reciprocal deliveries of crude oil. Exxon agreed to deliver 558,000 barrels of crude oil to Houston Oil during July, 1981, and Houston Oil "agreed to deliver the same amount of crude to Exxon during September through December, 1981." J.A. 56. The contract required Houston Oil "to secure its obligation by a letter of credit in favor of Exxon for $19,530,000." *Id.*

Houston Oil applied to respondent Paribas to issue the necessary "irrevocable standby letter of credit to cover the value of the oil delivered by Exxon." J.A. 66. Paribas agreed to do so and "charged Houston [Oil] a fee of $53,000 for establishing the credit." J.A. 67. A copy of the letter of credit was delivered to Exxon as the beneficiary. *Id.*

The letter of credit stipulated that the amount of the credit would be payable upon Exxon's submission, *inter alia*, of a "[s]tatement signed by an authorized representative certifying that Houston Oil . . . has failed to deliver to Exxon . . . 558,000 barrels of [crude oil] between September and December, 1981." J.A. 8. The letter of credit further specified in a succeeding paragraph, however, that this signed statement and other re-

quired "[d]ocuments must be presented not later than October 31, 1981." J.A. 9. Before issuing the letter of credit, Paribas itself noted "the apparent inconsistency" of these terms, under which "the letter expired *on October 31*, yet covered deliveries *between September and December*." J.A. 67 (emphasis in original). The apparent effect of this inconsistency was to condition payment upon presentation of proof of a breach of the underlying contract before any such breach could have occurred. Yet "Paribas never sought to amend the letter to remove the contradiction or to notify Exxon." J.A. 57.

Exxon satisfied its obligation to deliver 558,000 barrels of crude oil to Houston Oil during July, 1981. J.A. 10. Houston Oil made no reciprocal deliveries of crude oil to Exxon in either September or October. J.A. 12. Sometime prior to October 31, Exxon became aware, as Paribas had earlier, of the apparent internal contradiction in the letter of credit. J.A. 68. Exxon asked Houston Oil to have the letter amended to correct the expiration date. *Id.* Houston Oil represented that it would do so, but it never did. J.A. 68-69.

Nor did Houston Oil make the required reciprocal deliveries of crude oil. "Exxon learned sometime in November that [Houston Oil] was going to default." J.A. 57. Exxon "presented the certification of . . . default to Paribas on November 30, 1981, and again on December 1, 1981. Paribas rejected both presentments as untimely." *Id. See also* J.A. 14, 18. Houston Oil then agreed to compensate Exxon for its failure to deliver the crude oil, but it later defaulted on that agreement also. J.A. 59-60.

3. On October 6, 1982, Exxon instituted this action against Paribas in the 234th Judicial District Court of Harris County, Texas, to recover on the letter of credit. J.A. 3-7. Paribas removed the case to the United States District Court for the Southern District of Texas, where jurisdiction rested on 28 U.S.C. § 1332(a)(2). J.A. 19-

21. The case came before District Judge Hughes, who had been a Texas state court judge before his appointment to the federal bench. 1 *Almanac of the Federal Judiciary* 42-43 (1988).

Judge Hughes ruled for Exxon on cross-motions for summary judgment. He began his analysis by noting that the terms of the letter of credit appeared to cancel one another and render performance impossible:

> Two provisions of the letter clash. The certification provision requires that in order to collect under the letter, Exxon must certify that [Houston Oil] failed to deliver the required volume of crude in September-December. On the other hand, the presentment clause requires the certification of non-delivery to be made by October 31, 1981. . . .
>
> . . . Obviously Exxon could not have certified on October 31 that [Houston Oil] had not delivered through the end of the following two months.

J.A. 56, 58.

These considerations, Judge Hughes reasoned, brought into play two important rules of contract construction under Texas law: "[i]nconsistencies must be resolved against the party who drew the contract," and "contracts must be construed to render performance possible." J.A. 57. He concluded that these rules foreclosed a reading of the letter of credit that would cause the time for presentment to expire before it had become possible for Exxon to certify Houston Oil's failure to deliver the crude oil. The judge also noted that *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713 (Tex. App.—Dallas 1986, no writ), involving interpretation of a letter of guaranty, further demonstrated that Texas law would not countenance a construction that would frustrate the parties' essential purpose in securing the letter of credit. J.A. 58. Accordingly, Judge Hughes held that Texas law dictated "[a] construction in favor of Exxon." J.A. 57.

4. On October 8, 1987, a divided panel of the Fifth Circuit reversed. The panel majority consisted of Circuit Judges Jolly and Rubin, who are from Mississippi and Louisiana, respectively. 2 *Almanac of the Federal Judiciary* at 14, 5-6. Although the panel majority formally made reference to the Texas version of the Uniform Commercial Code, it made only passing (and incomplete) mention of the Texas decisions and rules of contract construction on which the district court had relied. Instead, the majority proceeded as if the case could appropriately be decided solely on the basis of an understanding of general principles of commercial law. Citing a diverse body of non-Texas decisional law and general legal treatises, handbooks, and other non-Texas authorities, the majority reversed because its reading of those authorities led it to conclude that "the obligation of the issuing bank had terminated even though it might not have been possible to present to the bank the documents required for payment before the expiry date." J.A. 65-66.

Circuit Judge Garza, who had served on the United States District Court for the Southern District of Texas before his appointment to the Fifth Circuit, 2 *Almanac of the Federal Judiciary* at 24, dissented on the ground that the panel majority had failed to follow Texas law:

> The majority, focusing on the expiry date and nothing else, in effect makes the letter of credit involved in this case a nullity.
>
> I agree with the court below that if Exxon had made any claim against the letter of credit before October 31, 1981, the Banque would not have honored any claim because Houston Oil . . . still had the months of November and December to return to Exxon the oil [it] had received under the original contract between Houston Oil . . . and Exxon.
>
> I am convinced that the Texas judge sitting on the court below, interpreting the letter of credit under Texas law, was correct.

J.A. 75-76.

The court denied Exxon's timely petition for rehearing on December 8, 1987. J.A. 78.

5. On November 17, 1987, the Court of Appeals for the Seventh District of Texas at Amarillo decided precisely the same issue of Texas law in *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied).[1] *Kerr Construction*, like this case, involved an effort to recover on a letter of credit with inconsistent terms relating to certification and presentment or expiration. But the Texas court, unlike the Fifth Circuit, held that in such circumstances the inconsistent expiry date is unenforceable. The court reasoned that the letter of credit must be enforced in a sensible manner that gives the beneficiary an opportunity to make presentation for payment once it becomes possible to certify that the obligor or account party has failed to perform in accordance with the terms of the underlying contract.

The two cases are on all fours, except as to result. In *Kerr Construction*, the letter of credit had been issued on September 17, 1984, and provided that presentation for payment was to be accompanied by a signed statement that the obligor or account party had failed to complete its performance of a contract for paving improvements "within ten (10) months," J.A. 30, *i.e.*, by July 17, 1985. The expiry date, however, was January 1, 1985 (later extended to July 1, 1985). J.A. 31-32. The underlying contract remained uncompleted on July 17, 1985, and the beneficiary presented the letter for payment on that date. J.A. 32. The issuer refused payment on the ground that the letter had expired. *Id.*

The Texas intermediate court of appeals held that the presentation for payment had been timely:

> It is well settled that the rules of construction for ordinary contracts govern letters of credit. It is

[1] The opinion in *Kerr Construction* is reproduced at J.A. 29-36.

> equally well settled that where there is an irreconcilable conflict between different parts or provisions of an instrument and the first part or provision is definite and certain and irreconcilable with later parts or provisions, the first part or provision must prevail. In this instance, it is undisputed that the first provision of the instrument [relating to certification] is in direct and irreconcilable conflict with the last provision of the instrument [relating to expiration] . . . .
>
> It [also] is well settled [that] when there is an irreconcilable conflict between provisions in the agreement, the provision which contributes most essentially to the agreement is entitled to the most consideration.

J.A. 32-33 (citations omitted). Because the basic "purpose of the letter of credit was assurance to the [beneficiary]," J.A. 35, the court concluded that the express expiry date, which would have rendered such assurance illusory, must give way.

The court appended at the end of its opinion the legend "Do not publish. Tex R. App. P. 90(e)." J.A. 36.

6. Exxon did not become aware of *Kerr Construction* until after the denial of rehearing and issuance of mandate in this case. When it did learn of *Kerr Construction*, Exxon immediately called that decision to the attention of the Fifth Circuit by moving for recall of mandate and for leave to file a second suggestion for *en banc* consideration (including a request that the issue be certified to the Texas Supreme Court). J.A. 26-38, 39-41.[2] The Fifth Circuit denied the motion for recall of mandate on the ground that under Tex. R. App. P. 90(i) "[u]npublished opinions shall not be cited as authority by counsel or by

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[2] In the Fifth Circuit, "'[a] suggestion for rehearing *en banc* will be treated as a petition for rehearing by the panel if no petition is filed. The panel may grant rehearing without action by the full Court.'" *Gonzalez v. Southern Pacific Transp. Co.*, 773 F.2d 637, 641 (5th Cir. 1985), quoting from the Internal Operating Procedures of the Fifth Circuit.

the court." J.A. 79. The motion for leave to file a second suggestion for rehearing *en banc* was denied without comment. J.A. 80.

7. This Court granted certiorari on April 25, 1988. Two days later, on April 27, 1988, the Texas Supreme Court denied review in *Kerr Construction* but also overruled a motion for publication of the intermediate appellate court's opinion in that case.[3]

SUMMARY OF ARGUMENT

The Fifth Circuit's decision in this case is fundamentally in error. The court violated the basic principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), by resting its decision not on Texas law but on its understanding of general commercial law. The court then compounded that error by refusing to reconsider in light of the intervening and conflicting decision in *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, writ denied).

A. *Kerr Construction* squarely conflicts with the Fifth Circuit's decision in this case. The facts of the two cases are essentially identical, and the results are diametrically opposite. Although *Kerr Construction* was decided by an intermediate appellate court, its holding "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). In fact, *Kerr Construction* is firmly grounded in well-established Texas rules of contract construction and is unquestionably correct as a matter of Texas law. In any event, the Texas Supreme Court's subsequent denial of review forecloses the federal courts from adopting a contrary view of Texas law.

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[3] A copy of the order of the Texas Supreme Court is set forth as Appendix B, *infra*. A renewed request for publication currently is pending before the state intermediate appellate court.

B. This case is governed by *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538 (1941), and *Huddleston v. Dwyer*, 322 U.S. 232 (1944). In *Vandenbark*, this Court held that a diversity court's duty to apply state law does not expire with the initial entry of judgment but instead continues "until such time as a case is no longer *sub judice*." 311 U.S. at 543. The reach of this principle is illustrated by *Huddleston*. There, after a court of appeals sitting in diversity had denied a second and untimely petition for rehearing that asked for reconsideration in light of an intervening state decision, this Court granted certiorari and, after argument, vacated and remanded with instructions to reconsider. This constitutes "a clear holding that it is the duty of the federal courts at any stage in the course of a proceeding, even after denial of a petition for rehearing in the Court of Appeals, to follow, if applicable, a state court decision although rendered subsequent to the rendition of judgment by a federal court." *Jones v. Schellenberger*, 225 F.2d 784, 791 (7th Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). *See also Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied*, 400 U.S. 829 (1970). The Fifth Circuit breached that duty in this case by refusing to reconsider in light of *Kerr Construction*.

Although the duty imposed by *Vandenbark* and *Huddleston* appears to be mandatory, the Fifth Circuit's refusal to reconsider would have been erroneous even if reconsideration had been a matter of discretion. The predominant interest of justice in diversity litigation is uniformity of outcome in state and federal courts. *E.g.*, *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). There are no strong countervailing interests warranting disparity of outcome here. The decision in *Kerr Construction* is clear, controlling, and easy to apply, and Paribas had not relied upon the Fifth Circuit's judgment in any manner that would have rendered reconsideration un-

just. The balance of interests dictated reconsideration. *Gondeck v. Pan American World Airways*, 382 U.S. 25 (1965). By refusing to reconsider, the Fifth Circuit improperly shifted the burden of achieving uniformity to this Court, through the certiorari process, or (if the Court had denied certiorari) to the district court (or back to the court of appeals) under Fed. R. Civ. P. 60(b).

C. Now that this Court has granted certiorari, it has assumed the duty of a diversity court to apply existing state law. *Huddleston* demonstrates that once this Court accepts jurisdiction over a diversity case, it is obligated to give effect to intervening developments in state law even if the judgment below may have appeared correct when entered. *See also Nolan v. Transocean Air Lines*, 365 U.S. 293, 295 (1961) (remanding for reconsideration in light of a new state decision that "was not brought to the attention of, and was not considered by," the court of appeals). Such cases are specific illustrations, in the context of diversity, of the principle, first stated in *United States v. The Schooner Peggy*, 5 U.S. 102 (1801), that when there has been an intervening change in the law, "it becomes our duty to recognize the changed situation, and either to apply the intervening law or decision or to set aside the judgment and remand the case so that the [lower] court may do so." *Gulf, Colorado & Santa Fe R. Co. v. Dennis*, 224 U.S. 503, 507 (1912). Accordingly, whether or not the Fifth Circuit erred in refusing to reconsider, this Court should either decide this case on the basis of the intervening decision in *Kerr Construction* or remand to the Fifth Circuit with instructions to do so.

D. Diversity courts are not governed by state procedural rules, such as the Texas rule of appellate procedure that bars citation of unpublished decisions in Texas courts. Because there is no uniform federal procedure with respect to citation of unpublished decisions, this Court must identify and establish a diversity procedure that remains

true to the *Erie* objective of uniformity of outcome and also speaks to the jurisprudential and constitutional concerns that are raised by no-citation procedures.

1. Application of state no-citation procedures would frustrate the *Erie* objective of uniformity of outcome. An unpublished state decision represents the result actually reached in state court; the very purpose of *Erie* is to ensure that a diversity court faced with the same facts will reach the same result. *Kerr Construciion* involved essentially the same facts as this case and arose at the same time; under *Erie*, the results should be the same. Moreover, the very fact that the opinion in *Kerr Construction* was not published indicates that it involved only a routine and noncontroversial application of settled principles of Texas law. It would be perverse if, as a consequence, a diversity court were forced to pretend that the opinion does not exist.

Because diversity courts are obligated to determine state law from "all the available data," *West v. American Tel. & Tel. Co.*, 311 U.S. at 237, they routinely look to unpublished state decisions for guidance on matters of state law. Diversity courts have declined to follow state no-citation procedures that would prevent them from knowing how legal disputes actually are resolved in state courts. *See, e.g., Aviles v. Burgos*, 783 F.2d 270, 283 n.4 (1st Cir. 1986). Of course, a lower state court's unpublished opinion need not be accepted uncritically. But in the absence of persuasive evidence that the state supreme court would disagree with the result reached by the lower state court, a diversity court faced with essentially the same facts should strive to reach the same result.

2. Application of state no-citation procedures also would conflict with other important federal interests.

Procedural rules that forbid citation of unpublished judicial opinions have been extensively criticized by judges,

scholars, practitioners, and other commentators. Such rules clash with important jurisprudential values and disserve fundamental interests of the legal system. By undermining the doctrine of *stare decisis*, no-citation rules cause "confusion, repetition, nonuniformity, and even skepticism about the way [courts] do [their] job." *National Classification Committee v. United States*, 765 F.2d 164, 175 (D.C. Cir. 1985) (Wald, J., separate statement). Diversity courts need not and should not exacerbate these problems by adopting state no-citation procedures.

In addition, no-citation procedures raise substantial constitutional doubts. As prior restraints on what may be said in or to a court, such procedures face "a heavy presumption against . . . constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). They not only curb speech but do so in a manner that directly impairs the right to petition for redress of grievances. Due process and equal protection concerns also are implicated. *See, e.g.*, 28 U.S.C. 10th Cir. Rules, App III (1988 Supp.) (Holloway, C.J., dissenting from promulgation of rule). These constitutional doubts would have to be resolved before diversity courts could bind themselves to state no-citation procedures.

E. If this Court nevertheless concludes that diversity courts are obligated to follow state no-citation procedures, it would be appropriate, especially in view of the Fifth Circuit's failure otherwise to make a conscientious effort to ascertain and apply state law, to certify the underlying question of Texas law to the Texas Supreme Court.

ARGUMENT

THIS DIVERSITY CASE IS GOVERNED BY TEXAS LAW AS ILLUSTRATED BY AND APPLIED IN THE INTERVENING DECISION OF THE TEXAS INTERMEDIATE COURT OF APPEALS IN *KERR CONSTRUCTION*

In *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), this Court held that federal courts sitting in diversity must apply state common law. By historical coincidence, certiorari was granted in this case on the fiftieth anniversary of the announcement of the decision in *Erie*. The opinion below, however, reads as if *Erie* had never been decided.

The Fifth Circuit's "opinion does not rest its conclusions upon its appraisal of Texas law or Texas decisions." *Griffin v. McCoach*, 313 U.S. 498, 503 (1941). The court did not, even once, acknowledge its obligation to follow state law. Instead, the court proceeded as if the issue before it could and should be resolved as a matter of general commercial law. Its opinion thus reflects the jurisprudence not of *Erie* but of *Swift v. Tyson*, 41 U.S. 1, 18 (1842), which proclaimed that the Rules of Decision Act had no application "to questions of general commercial law, where [the proper function of a diversity court is] to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case."

Of course, *Erie* overruled *Swift*. Justice Story's vision of a diversity jurisdiction unencumbered by state common law has long since been discredited. Yet, even so, it is as true here as in *Rosenthal v. N.Y. Life Ins. Co.*, 304 U.S. 263, 264 (1938), that the "Court of Appeals decided the questions . . . as matters of general law according to the weight of authority. . . . It is enough to say that the questions to be decided are those of state

law and should have been determined according to the decisions of the state court." The Fifth Circuit's opinion thus bears witness to the fact that, although half a century has passed since *Erie* was decided, its teaching still has not been taken fully to heart.

By deciding this case as a matter of general commercial law, the Fifth Circuit had committed reversible error even before it compounded that error by refusing to reconsider in light of the intervening and conflicting decision in *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0206-CV (Tex. App.—Amarillo 1987, writ denied). Consequently, even if *Kerr Construction* were to be disregarded, the judgment below could appropriately be reversed and the case remanded with instructions to ascertain and follow Texas law. *Griffin v. McCoach*, 313 U.S. at 504; *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956) (per curiam). Such a disposition of this case would have the salutary effect of reaffirming the centrality of the *Erie* doctrine and warning against laxness in its application.

In a sense, *Kerr Construction* does little more than highlight and dramatize the Fifth Circuit's failure to apply Texas law. But especially in view of that decision, which addressed precisely the same issue of Texas law presented by this case, the judgment below must be reversed.

A. The Intervening Decision In *Kerr Construction* Demonstrates The Proper Application Of Texas Law To The Facts Of This Case

Kerr Construction speaks to the very same question of contract construction that the Fifth Circuit had before it in this case. *Kerr Construction* holds that, as a matter of Texas law, when the certification provision of a letter of credit conflicts with the presentation clause or expiry date set forth in a later paragraph, the certification provision controls. This means that a prema-

ture expiry date does not foreclose the beneficiary (Exxon) from validly presenting the letter of credit for payment by the issuer (Paribas) once it becomes possible to certify, in the manner prescribed by the certification provision, that the obligor whose performance the letter was intended to secure (Houston Oil) has failed to perform in accordance with the terms of the underlying contract. If the Fifth Circuit had followed the Texas rules of contract construction applied in *Kerr Construction*, it would have decided this case, as the district court did, in Exxon's favor.

Kerr Construction was decided by an intermediate appellate court rather than by the Texas Supreme Court, but this did not justify the Fifth Circuit's refusal to reconsider. "An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940). The decision of a state intermediate appellate court on an issue of state law "is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. American Tel. & Tel. Co.*, 311 U.S. 233, 237 (1940). *See also Six Companies of California v. Joint Highway District*, 311 U.S. 180, 188 (1940). Under that standard, *Kerr Construction* should be followed and may not be disregarded.

1. Kerr Construction *was correctly decided as a matter of Texas law*

The Texas intermediate court of appeals began its analysis in *Kerr Construction* with the observation, which the Texas Supreme Court has explicitly endorsed, that "the rules of construction for ordinary contracts govern letters of credit." J.A. 32. *See Temple-Eastex Inc. v.*

Addison Bank, 672 S.W.2d 793, 798 (Tex. 1984); *Republic National Bank v. Northwest National Bank*, 578 S.W.2d 109, 115 (Tex. 1978). The *Kerr Construction* court then proceeded to invoke and apply two well-established Texas rules of contract construction, each of which dictated that the letter of credit there at issue be construed in favor of the beneficiary.

First, the court noted that under Texas law "where there is an irreconcilable conflict between different parts or provisions of an instrument and the first part or provision is definite and certain and irreconcilable with later parts or provisions, the first part or provision must prevail." J.A. 33. As another Texas court has explained,

> If the provisions in question . . . are so repugnant as to create a genuine ambiguity, . . . then we apply the rule that the provision first appearing in the agreement must be given controlling effect over the later conflicting provision. The rule is thus stated in 13 Tex. Jur. 2d, Contracts, § 142, p. 323:
>
> > . . . if there is an irreconcilable conflict between two clauses, by which the meaning of the contract is rendered obscure or doubtful, the provisions of the first clause will be deemed to be controlling.

Caranas v. Morgan Hosts-Harry Hines Boulevard, Inc., 460 S.W.2d 225, 228 (Tex. App.—Dallas 1970, no writ) (citations omitted). The Texas Supreme Court has endorsed this "rule which gives effect to an earlier over a later provision." *Southland Royalty Co. v. Pan American Petroleum Corp.*, 378 S.W.2d 50, 57 (Tex. 1964). Indeed, the rule (which the Fifth Circuit in this case completely ignored) has an ancient provenance in Texas. *See Witt v. Harlan*, 2 S.W. 41, 42 (Tex. 1886).

Second, the court reasoned that "when there is an irreconcilable conflict between provisions in an agreement, the provision which contributes most essentially to the

agreement is entitled to the most consideration." J.A. 33. This also is hornbook law in Texas: "If a variance exists between two clauses in the instrument, . . . the clause which contributes most essentially to the agreement is the one that is entitled to the greater consideration." *Caranas v. Morgan Hosts-Harry Hines Boulevard, Inc.*, 460 S.W.2d at 228 (quoting 13 Tex. Jur. 2d Contracts § 142 at 323).

The certification provision contributes more essentially to a standby letter of credit than does the expiry date. The expiry date is of course important, but it is largely unrelated to the central purpose of the agreement. In contrast, the certification provision constitutes the very heart of the bargain: it defines the issuer's core undertaking, *i.e.*, to provide security for the obligor's performance of the underlying contract. Because there was a direct conflict between the certification provision and the expiry date in *Kerr Construction*, as there also was in this case, the Texas court (unlike the Fifth Circuit) correctly applied Texas law when it gave the former provision precedence over the latter.

Moreover, "[i]n Texas, a writing is generally construed most strictly against its author. . . . As a result, the bank's letter of credit is construed most strictly against the bank because it drafted the letter of credit." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d at 798. *See also Republic National Bank v. Northwest National Bank*, 578 S.W.2d at 115. The result in *Kerr Construction* (unlike the result below in this case) conforms to this well-established rule.

Finally, "a construction rendering the contract possible of performance will be preferred to one that renders its performance impossible or meaningless." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d at 798. *See also Republic National Bank v. Northwest National Bank*,

578 S.W.2d at 115; *Portland Gasoline Co. v. Superior Marketing Co.*, 243 S.W.2d 823, 824 (Tex. 1951). If the expiry date of the letter of credit in *Kerr Construction* had been controlling, the beneficiary (like Exxon here) would have had no protection at all against nonperformance of the underlying contract: the letter of credit would have been an empty and meaningless promise, and the contracting parties' purpose in obtaining it would have been totally frustrated. As in *BA Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713, 716 (Tex. App.—Dallas 1986, no writ), which involved a similar issue arising under a letter of guaranty, a literal application of the expiry date "would, in effect, have made a proper demand technically impossible and, therefore, would be contrary to the intent of the parties." A literal application, in other words, would have violated the most basic of all canons of contract construction: "to reach a reasonable result consistent with the apparent intent of the parties." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d at 798.

For all these reasons, the result in *Kerr Construction* was dictated by existing Texas precedent. There was nothing to suggest, even before the Texas Supreme Court denied review, "that the highest court of the state would decide otherwise." *West v. American Tel. & Tel. Co.*, 311 U.S. at 237.

2. *The Texas Supreme Court's denial of review in* Kerr Construction *forecloses federal courts from adopting a contrary view of Texas law*

Even if it were not otherwise evident that *Kerr Construction* had been correctly decided as a matter of Texas law, the Texas Supreme Court's subsequent denial of review forecloses a diversity court from insisting upon a contrary view of Texas law. When a state supreme court, by denying review, has let stand a decision of an intermediate appellate court, it is not the province of the federal courts (at least in the absence of a clear con-

flict among the lower state courts) to speculate concerning how the state supreme court would have decided the case if review had been granted. In this situation, a federal court is "not at liberty to depart from the state appellate court's resolution of these issues of state law." *Hicks v. Feiock*, 108 S. Ct. 1423, 1428 (1988). *See also, e.g., Kolender v. Lawson*, 461 U.S. 352, 355-56 n.4 (1983); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464, 466-69 (1940).

B. The Fifth Circuit Should Have Reconsidered Its Judgment In This Case In Light Of *Kerr Construction*

In *Vandenbark v. Owens-Illinois Co.*, 311 U.S. 538, 543 (1941), this Court explained that a diversity court's duty to adhere to state law does not expire with the initial entry of judgment but instead continues for as long as a case remains *sub judice*:

> While not insensible to possible complications, we are of the view that, until such time as a case is no longer *sub judice*, the duty rests upon the federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.

The Court had occasion to illustrate the reach of this principle in *Huddleston v. Dwyer*, 322 U.S. 232 (1944). There, an intervening and conflicting state decision had been brought to the attention of the court of appeals in a second petition for rehearing, after an initial timely petition had been denied. When the court of appeals refused to reconsider, this Court granted certiorari and, after argument, vacated and remanded for reconsideration on the authority of *Vandenbark*.

This case is governed by *Erie*, *Vandenbark*, and *Huddleston*. It calls for little more than a routine application of the *Vandenbark* principle on facts virtually indistinguishable from those in *Huddleston*. The intervening state decision in *Kerr Construction* was handed down while the initial petition for rehearing in this case was

pending, and it was brought to the attention of the court of appeals shortly after that petition was denied and considerably before the filing of a timely petition for certiorari. In these circumstances, the *Vandenbark* principle, as illustrated by its application in *Huddleston*, required the Fifth Circuit to vacate its prior judgment and reconsider in light of *Kerr Construction*.

1. *This Court's decisions in* Vandenbark *and* Huddleston *imposed a duty to reconsider*

In *Vandenbark* this Court was concerned about the effect of a change in state law occurring after a district court had entered final judgment in a diversity case but before the case was submitted on appeal. The Court held that in such circumstances a federal court of appeals must follow the new state decision, even though the result may be to "cause the reversal of judgments which were correct when entered." 311 U.S. at 543. In so holding, the Court reasoned broadly that a federal court has a continuing duty to follow and apply changes in state law "until such time as a [diversity] case is no longer *sub judice*." 311 U.S. at 543. This implies that just as a trial judgment must be reversed on the basis of an intervening and conflicting state decision, so must a still-reviewable appellate judgment be vacated and reconsidered. "Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law." *Id.*

Of course, even before *Vandenbark* it was understood that *Erie* itself requires a court of appeals to reconsider its prior judgment when a timely petition for rehearing discloses the existence of contrary state authority. *See American Nat. Ins. Co. v. Belch*, 100 F.2d 48 (4th Cir. 1938). Insofar as situations of that kind are concerned, *Vandenbark* simply made explicit a requirement that was already implicit. *See, e.g., Maxey v. Freightliner Corp.*, 665 F.2d 1367 (5th Cir. 1982) (*en banc*); *Doggrell v. Southern Box Co.*, 208 F.2d 310 (6th Cir. 1953). The

question this Court confronted in *Huddleston* was whether the duty to follow and apply new state decisions extends beyond not only entry of final judgment by the court of appeals but also denial of rehearing.

The facts in *Huddleston* were essentially the same as those here. In a diversity case involving Oklahoma law, the Tenth Circuit had entered judgment based upon its "examination of the Oklahoma authorities." 322 U.S. at 234. The following sequence of events then occurred:

> Petitioners filed a timely petition for rehearing which was denied on September 1, 1943. On December 17, 1943, petitioners moved for leave to file a second petition for rehearing which the Circuit Court of Appeals denied. In their second petition, petitioners brought to the attention of the court and relied upon an opinion of the Supreme Court of Oklahoma in *Wilson v. City of Hollis*, . . . which had superseded its earlier opinion on which the Circuit Court of Appeals had relied in its opinion in this case.

Id. at 235. Because the court of appeals had failed to amend its judgment to reflect the intervening state decision, this Court granted certiorari and, after argument, "vacate[d] the judgment below and remand[ed] the cause to the Circuit Court of Appeals so that it may reconsider its decision in the light of the decisions and opinions of the Supreme Court of Oklahoma in the *Wilson* and later cases." *Id.* at 237-38. "Thus, here is a clear holding that it is the duty of the federal courts at any stage in the course of a proceeding, even after denial of a petition for rehearing in the Court of Appeals, to follow, if applicable, a state court decision although rendered subsequent to the rendition of judgment by a federal court." *Jones v. Schellenberger*, 225 F.2d 784, 791 (7th Cir. 1955), *cert. denied*, 350 U.S. 989 (1956).

The proper course of action in cases such as this is illustrated by *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 424 F.2d 427 (2d Cir.), *cert. denied*, 400 U.S.

829 (1970). There, the court of appeals initially had entered judgment in May, 1969, and had denied rehearing in June. Three weeks later, the Florida Supreme Court "reversed the intermediate appellate court decision on which we had relied." *Id.* at 429. The losing party in the Second Circuit, having discovered the intervening Florida decision while its petition for certiorari was pending, immediately moved for leave to file a petition for rehearing out of time in the Second Circuit. In a carefully reasoned opinion, the Second Circuit determined that it should reconsider:

> In *Huddleston*, the petitioners had sought a second rehearing some six months after entry of judgment, a period considerably longer than that before us. The Supreme Court indicated that so long as the case was "*sub judice*" the court of appeals should have entertained the petition for rehearing based on a change in state law; it did not indicate, however, precisely what the bounds of the term "*sub judice*" might be. Under circumstances similar to *Huddleston*, we may consider petitions filed after rehearing has been denied, and even after the time to petition for rehearing has passed, *see* F.R.A.P. 40. The question we must determine is whether we should also entertain rehearings when a petition for certiorari already has been filed. *Huddleston* seems to indicate that we should. Instead of reversing the court of appeals, and deciding the state law issues itself, the Supreme Court there vacated the court of appeals decision, and remanded to that court to permit it to determine the issues of state law in the first instance, on the basis of the new state court decision. For us to refuse to consider petitions for rehearing under the circumstances present here merely because a petition for certiorari has been filed would be, it seems to us, wasteful, for under the *Huddleston* procedure the Supreme Court would not reach the merits of the controversy, but would vacate our decision and order us to reconsider on the basis of the recent state opinion. Hence we conclude that in the interests of justice

> we should consider what effect the Florida Supreme Court's [intervening] decision . . . will have on our prior judgment in this case.

Id. at 429-30.

In *Braniff*, the intervening state decision was not called to the attention of the court of appeals until after a petition for certiorari already had been filed. On at least one occasion, moreover, this Court has granted rehearing from the denial of certiorari on the basis of an intervening state decision that was not even handed down until certiorari already had been denied. *Conner v. Simler*, 367 U.S. 486 (1961). Thus, "[t]he *Erie-Vandenbark* principle has been applied where a change in state law has occurred . . . between a first and second petition for rehearing in the court of appeals [*Huddleston*], during the pendency of a petition for a writ of certiorari [*Braniff*], and after a denial of certiorari but prior to the filing of a timely petition for rehearing [*Conner*]." Comment, *Civil Procedure*—Erie *Outcome Determination Principle Requires Rule 60(b)(6) Relief from Final Judgment After Change in State Law*, 29 Rutgers L. Rev. 921, 931 (1976).

In light of these decisions, it could be argued that, inasmuch as a case remains *sub judice* at least until the time for filing a petition for rehearing in this Court has expired, a court of appeals continues until that time to be subject to the duty of revising its judgment to conform to intervening changes in state law. On the other hand, one commentator, in discussing the "outer limit for the period during which a case is *sub judice*," has suggested that a "reasonable line might be drawn when a case is denied certiorari or decided on certiorari such that Supreme Court review is no longer available except through the rehearing procedure." Note, *Pierce v. Cook & Co.: Change in State Law as a Ground for Relief from a Federal Judgment*, 124 U. Pa. L. Rev. 843, 857 (1976). *Accord, Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336,

337 (3d Cir. 1982). That debate need not be joined here. This case does not test or explore the outer limits of the *Vandenbark* principle. The intervening state decision in *Kerr Construction* was brought to the Fifth Circuit's attention well before the filing of a timely petition for certiorari, when the case unquestionably remained *sub judice* and the court of appeals was free to act without fear of infringing upon this Court's supervening jurisdiction. Under *Huddleston*, when a party brings the new state decision to the attention of the court of appeals *before* the timely filing of a petition for certiorari, as Exxon did in this case, the court's duty to rehear is manifest.

That is as it should be. The purpose of *Erie* "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). This purpose can be achieved only if the federal courts of appeals are subject to a continuing duty to consider and apply post-judgment developments in state law at least until a diversity case becomes subject to the supervening jurisdiction of this Court (or until the time expires for invoking that jurisdiction). Otherwise, exercise of the diversity jurisdiction can give rise, as here, to the essentially simultaneous issuance of conflicting state and federal decisions, with the difference in outcome turning on nothing more than the accident of diversity. *Erie*, *Vandenbark*, and *Huddleston* all forbid that result.

2. Even if there had been no duty to reconsider, the Fifth Circuit's refusal to reconsider would have been an abuse of discretion in the circumstances of this case

Normally, consideration of a second and untimely petition for rehearing is a matter of discretion. *Vandenbark* and *Huddleston* appear to remove that discretion where,

as here, the second petition is based upon an intervening and conflicting state decision that demonstrates that a diversity case that is still *sub judice* has been wrongly decided as a matter of state law. But if the Fifth Circuit did have some residual measure of discretion, its refusal to rehear was a clear abuse of that discretion.

When a court receives a second petition for rehearing based upon intervening events, it is called upon to balance the general interest in finality against the more specific interests of justice in the immediate case. The "established doctrine [is] that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules [relating to finality].'" *Gondeck v. Pan American World Airways*, 382 U.S. 25, 26-27 (1965) (quoting *United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)).

The predominant interest of justice in diversity litigation is the "realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court." *Hanna v. Plumer*, 380 U.S. 460, 467 (1965). This overriding objective of uniformity of outcome militates strongly in favor of revising judgments in diversity cases, while they remain *sub judice*, to conform to the judgments in intervening and conflicting state decisions. Even apart from *Vandenbark* and *Huddleston*, therefore, rehearing in this case should have been granted as a matter of course in the absence of strong countervailing interests of justice.

There were no such countervailing interests present here. To begin with, this is not a case where the intervening state decision had only tangential or merely arguable relevance. Rehearing would not have entailed an elaborate and studied parsing of an ambiguous state court opinion or a judgmental extension of the opinion's reasoning to fit importantly different facts. *Cf. Nolan v. Transocean Air Lines*, 290 F.2d 904 (2d Cir.), *cert.*

denied, 368 U.S. 901 (1961). The Texas court in *Kerr Construction* squarely held, in factual circumstances virtually identical to those here, that where the certification provision and expiry date of a letter of credit conflict, the certification provision controls. That holding, which is directly contrary to the Fifth Circuit's holding in this case, could easily have been applied by the Fifth Circuit on rehearing. Moreover, Paribas had not changed its position or otherwise relied upon the Fifth Circuit's decision in any manner that would have rendered rehearing inappropriate or unjust.

In circumstances such as these, denial of rehearing inappropriately shifts the burden of achieving uniformity onto other courts and other procedural mechanisms. In the first instance, the burden is shifted to this Court through the certiorari process. If the disappointed litigant cannot obtain a rehearing in the court of appeals, he naturally turns to this Court. The Court has responded on a number of occasions by granting certiorari and summarily vacating or reversing and remanding for reconsideration in light of the intervening state decision. *See, e.g., Blaauw v. Grand Trunk Western R. Co.*, 380 U.S. 127 (1965); *Carter Oil Co.* v. *Welker*, 317 U.S. 592 (1942); *Chase Securities Corp. v. Vogel*, 312 U.S. 666 (1941). This procedure, however, is cumbersome and institutionally inefficient. It obviously would be preferable for the court of appeals, which already is familiar with the case, to undertake reconsideration without requiring this Court to act first. That consideration was given considerable weight by the Second Circuit in *Braniff* (albeit in an opinion that left unclear whether the court thought it was exercising discretion or acting under compulsion of *Vandenbark*). *See* 424 F.2d at 430.

If this Court denies certiorari in a diversity case, the burden of responding to post-judgment developments in state law then shifts back to the court of appeals or district court, which will be called upon to consider the mat-

ter in the context of Fed. R. Civ. P. 60(b). Rule 60(b) permits judgments to be reopened in light of intervening changes in the law, and at least one court of appeals has concluded that it authorizes the judgment in a diversity case to be reconsidered in light of a state decision handed down after the denial of certiorari (and also after the expiration of time for filing a petition for rehearing in this Court). *Pierce v. Cook & Co., Inc.*, 518 F.2d 720 (10th Cir. 1975) (*en banc*), *cert. denied*, 423 U.S. 1079 (1976). When the intervening state decision has been announced even before the timely filing of a petition for certiorari, it makes no sense for a court of appeals to force the disappointed diversity litigant first to file a petition for certiorari, and then to file a motion under Rule 60(b), when the relief requested can be provided sooner and more directly by simply granting rehearing in the first place.

Furthermore, it should not be forgotten that Exxon originally brought this action in state court. As a result of the decision below, and the Fifth Circuit's failure to correct that decision in light of *Kerr Construction*, Exxon has been denied the benefit of the substantive law that would have governed its claim if Paribas had not removed the action to federal court. This result strikes at the very heart of the *Erie* principle. To permit a defendant like Paribas to evade liability through the simple expedient of removing to federal court "create[s] discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co. v. Tompkins* was designed to eliminate." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949). It is just plain wrong to deny to a plaintiff who sued in state court the benefit of an intervening state decision that establishes or confirms his right to recover under state law.

C. This Court Has Now Assumed Responsibility, Under *Huddleston* and *The Schooner Peggy*, For Ensuring That This Case Is Decided According To Existing State Law

This Court's exercise of the certiorari power is perhaps the purest example of nonreviewable discretion in American law. For obvious reasons, the Court does not find it possible and cannot be expected to correct every erroneous appellate decision that comes before it on petition for writ of certiorari. If a court of appeals erroneously fails to reconsider its judgment in a diversity case in light of an intervening state decision—whether the erroneous failure constitutes the breach of a mandatory duty or instead only an abuse of discretion—this Court itself is not duty-bound to repair that failure. The *Vandenbark* principle does not reach that far.

Once the Court grants certiorari, however, the situation is different. When it exercises its discretionary jurisdiction to hear a diversity case, this Court, like the lower federal courts sitting in diversity, is subject to "the duty . . . to apply state law . . . in accordance with the then controlling decision of the highest state court." *Vandenbark*, 311 U.S. at 543. *Huddleston* itself is the prime example. The intervening state decision in that case had not been announced until after the court of appeals had denied the initial petition for rehearing. When it vacated and remanded for reconsideration in light of that intervening decision, this Court did not explicitly state that the court of appeals had erred in denying the second petition for rehearing. Instead, the Court explained:

> a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones.

322 U.S. at 236. Because the decision of the Tenth Circuit in that case appeared correct as a matter of state law

"when the judgment was rendered," and the state court "disapproved of [its] former rulings and adopted different ones" only "in the meantime" between entry of the Tenth Circuit's judgment and submission of the case to this Court, the "appellate review" identified in the above passage necessarily encompassed this Court's own review on certiorari.

Huddleston therefore means that once this Court accepts jurisdiction over a diversity case, it is obligated to give effect to intervening post-judgment developments in state law. This reading is confirmed by *Nolan v. Transocean Air Lines*, 365 U.S. 293, 295 (1961), where, after argument, the Court vacated and remanded for reconsideration in light of a new state decision that "was not brought to the attention of, and was not considered by" the court of appeals. *Cf. Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. 525, 534 n.6 (1958) (determining state law by reference to a state decision that "came down several months after the Court of Appeals decided this case").

Huddleston, *Nolan*, and even *Vandenbark* itself are merely specific illustrations, in the context of diversity, of the larger principle first stated by this Court in *United States v. The Schooner Peggy*, 5 U.S. 102, 109-10 (1801):

> It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . In such a case, the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

This Court, no less than the lower federal courts, is subject to this principle. When there has been an interven-

ing change in the applicable law, "it becomes our duty to recognize the changed situation, and either to apply the intervening law or decision or to set aside the judgment and remand the case so that the state court may do so." *Gulf, Colorado & Santa Fe R. Co. v. Dennis*, 224 U.S. 503, 507 (1912). *See also, e.g., Cort v. Ash*, 422 U.S. 66, 76-77 (1975); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281-82 (1969). In some instances the Court has even modified its own judgments in order to reflect post-judgment changes in the law. *See, e.g., 149 Madison Avenue Corp. v. Asselta*, 331 U.S. 795 (1947).

The rule of *The Schooner Peggy* requires reversal here whether or not the Fifth Circuit erred in refusing to rehear. This Court now has assumed responsibility for ensuring that this diversity case is decided according to existing state law, and the intervening and conflicting decision in *Kerr Construction* amply demonstrates that the judgment below is at odds with the law of Texas as it applies to the facts of this case.

In these circumstances, this Court could vacate and remand to the court of appeals with instructions to reconsider in light of the intervening state decision, as it did in *Huddleston, Nolan, Blaauw*, and other similar cases. Alternatively, because the underlying issue of state law is not truly "in doubt or deserving further canvass," *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 205 (1956), the Court could appropriately dispose of the case once and for all by reversing outright on the authority of the body of Texas law applied by and incorporated in *Kerr Construction*. Although the latter approach would require this Court to decide the issue of state law itself, it has the important advantage of leading to the prompt and final conclusion of litigation. But whether the Court renders final judgment or instead just vacates and remands, its disposition of this case should be informed by and should confirm the duty of the federal

judiciary, including this Court, to decide diversity cases in accordance with existing state law.

D. The Texas Rules Of Appellate Procedure Do Not Preclude Diversity Courts From Considering Unpublished State Court Opinions

The Texas intermediate appellate court that decided *Kerr Construction* chose not to publish its opinion. J.A. 36. The Fifth Circuit referred to that fact when it denied Exxon's motion for recall of mandate in this case. J.A. 79. The Fifth Circuit apparently believed that reconsideration in light of *Kerr Construction* was either foreclosed or rendered unnecessary or inappropriate by Tex. R. App. P. 90(i), which provides as a state rule of appellate procedure that "[u]npublished opinions shall not be cited as authority by counsel or by a court." But diversity courts are not governed by state procedural rules. To the contrary, "both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law." *Hanna v. Plumer*, 380 U.S. at 471.

Unlike *Hanna*, this case does not present a classic instance of conflict between state and federal procedure. On the one hand, the state procedural rule itself is honored in the breach. Although the purport of Rule 90(i) is that unpublished opinions "should not be cited," *Berry v. Berry*, 647 S.W.2d 945, 947 (Tex. 1983), it is in fact not uncommon for Texas courts to cite and rely upon such opinions. *See, e.g., Allegheny Int'l Credit Corp. v. Segal*, 735 S.W.2d 552, 554 n.3 (Tex. App.—Dallas 1987, no writ); *Hare v. State*, 713 S.W.2d 396, 397 (Tex. App.—El Paso 1986, writ ref'd); *Weldon v. Hill*, 678 S.W.2d 268, 272 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *Gonzales v. State*, 672 S.W.2d 618, 620 (Tex. App.—Amarillo 1984, no writ). On the other hand, there is no clear-cut federal procedure with respect to the citation of unpublished opinions. This Court's

Rules do not address the issue. The Fifth Circuit allows citation and follows its own unpublished opinions as "binding precedent." *United States v. Don B. Hart Equity Pure Trust*, 818 F.2d 1246, 1250 (5th Cir. 1987). *See also* 5th Cir. R. 47.5.3. The practices of the other federal courts of appeals are not uniform in this regard.[4]

This case therefore does not present a simple (or difficult) choice between established federal and state procedures. Rather, it requires the identification and establishment of a diversity procedure that remains true to the *Erie* objective of uniformity of outcome and also speaks to the jurisprudential and constitutional concerns raised by prohibitions against citation of unpublished judicial opinions.

1. *Application of state no-citation procedures would frustrate the* Erie *objective of uniformity of outcome*

"The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in federal court instead of in a State court a block away should not lead to a substantially different result." *Guaranty Trust Co. v. York*, 326 U.S. at 109. *See also, e.g., Sun Oil Co. v. Wortman*, 56 U.S.L.W. 4601, 4604 (U.S. June 13, 1988) (No. 87-

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[4] In addition to the Fifth Circuit, the Third, Fourth, Sixth, and Eleventh Circuits permit citation of unpublished opinions (although the latter three courts "disfavor" the practice). 3d Cir. R. 21(i); 4th Cir. R. 36.5; 6th Cir. R. 10(f); 11th Cir. R. 36-1. The Temporary Emergency Court of Appeals has no rule with respect to the citation of unpublished opinions and therefore presumably permits it. The remaining federal courts of appeals prohibit citation at least of their own unpublished opinions. D.C. Cir. R. 11(c); 1st Cir. R. 45(b)(6); 2d Cir. R. 0.23; 7th Cir. R. 53(b)(2)(iv); 8th Cir. R. 8(i); 9th Cir. R. 36-3; 10th Cir. R. 36.3; Fed. Cir. R. 18(c). *See generally* D. Stienstra, *Unpublished Opinions: Problems of Access and Use in the Courts of Appeals* (Federal Judicial Center 1985); W Reynolds & W. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573 (1981).

352); *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941). Of course, the principle of uniformity is not ironclad. When state and federal rules conflict, the choice of which rule to apply is thought to require a balancing of "the policy underlying the federal rule against the objective of achieving identical results in federal and state courts." Comment, *supra*, 29 Rutgers L. Rev. at 933. *See also Byrd v. Blue Ridge Rural Elec. Cooperative, Inc.*, 356 U.S. at 537-39; Note, *Choice of Procedure in Diversity Cases*, 75 Yale L.J. 477 (1966). In the context of this case, however, both interests are on the same side of the balance. There is no tension here between the application of a federal rule that allows consideration of unpublished state court opinions and achievement of identical results in federal and state courts: consideration of unpublished state decisions will further, not hinder, the *Erie* objective of uniformity of outcome.

The first and most obvious point to make is that an unpublished state decision represents the result actually reached in state court. The very purpose of *Erie* is to ensure that a federal court faced with the same facts will reach the same result. The logic of *Erie* itself therefore strongly militates in favor of consideration of unpublished as well as published state decisions.

This conclusion has special force in the circumstances of this case. The facts of this case are identical in all essential respects to those in *Kerr Construction*. This means that the state decision is relevant here not just as a statement of general legal principles, and not just as an example of the application of those principles to materially distinguishable facts, but as direct proof of how the state courts would actually have decided this particular controversy. Furthermore, this case and *Kerr Construction* are parallel and contemporaneous. The state decision is not a mere historical curiosity; it demonstrates the manner in which the state courts currently deal with the underlying issue in this case. Consequently, if the

federal courts in this case are to carry out the mandate of *Erie*, *i.e.*, to reach the same result that the state courts would have reached, they must look at what the state courts in fact do. They must look at *Kerr Construction*.

Nonpublication does not render *Kerr Construction* an unreliable guide to Texas law. To the contrary, nonpublication means that, in the judgment of both the state intermediate appellate court and the Texas Supreme Court, *Kerr Construction* involved nothing more than a routine and noncontroversial application of settled principles of Texas law. Under Tex. R. App. P. 90(c), an opinion is not published unless it "(1) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority." In other words, nonpublication signals that *Kerr Construction* was a garden variety case for which, as a matter of Texas law, only one outcome was considered possible. It would make a mockery of the *Erie* principle of uniformity if federal courts were forced to ignore a state decision that went unpublished precisely because it was understood to stand in the undisputed mainstream of state law.

Paribas argues, however, that a federal court sitting in diversity is constrained to look only to those authorities to which a state court itself would look. But that confuses a superficial concern, *i.e.*, how judges go about learning the law, with the deeper motive of *Erie*, *i.e.*, to reach the same result that a state court would reach (or, as here, that a state court already has reached).

It is both appropriate and necessary for diversity courts to consider unpublished state decisions if they are to achieve the *Erie* objective of uniformity of outcome. Diversity courts are obligated to determine state

law from "all the available data." *West v. American Tel. & Tel. Co.*, 311 U.S. at 237. *See also Bernhardt v. Polygraphic Co. of America*, 350 U.S. at 210 (Frankfurter, J., concurring) (in applying *Erie*, "law is not restricted to what is found in Law Reports, or otherwise written"). They "may consider all available legal sources, including the Restatements of Law, treatises, law review commentaries, decisions from other jurisdictions whose doctrinal approach is substantially the same, and 'the majority rule.'" 19 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4507 at 100-03 (1982) (citations omitted). A diversity court therefore also should be permitted to consider the result reached by three state appellate judges on the identical issue, whether or not their opinion was "mailed to the West Publishing Company." *Jones v. Mabry*, 723 F.2d 590, 596 (8th Cir. 1983), *cert. denied*, 467 U.S. 1228 (1984). To rely upon secondary materials in the face of a contrary state decision directly on point would constitute a major step back toward the jurisprudence of *Swift v. Tyson*.

The Sixth Circuit early and correctly reached the conclusion that diversity courts should avail themselves of the learning provided by unpublished state intermediate appellate court opinions:

> We . . . cannot ignore this data so definitely presented as to what the state law is upon the precise point at issue in the instant case. . . . [I]f the present suit had been brought in [a state trial court], no reason is advanced for supposing that the [state intermediate appellate court] would depart from its previous ruling or that the [state supreme court] would grant the review which it withheld before.

Gustin v. Sun Life Assur. Co. of Canada, 154 F.2d 961, 963 (6th Cir.), *cert. denied*, 328 U.S. 866 (1946). Since that time, it has become accepted practice for federal courts sitting in diversity to look to unpublished state decisions for guidance on matters of state law. *See, e.g.*,

Gatewood v. Fiat, S.p.A., 617 F.2d 820, 825 (D.C. Cir. 1980); *MGM Grand Hotel, Inc. v. Imperial Glass Co.*, 533 F.2d 486, 489 (9th Cir.), *cert. denied*, 429 U.S. 887 (1976); *Bradley v. General Motors Corp.*, 512 F.2d 602, 605 (6th Cir. 1975); *Fiat Motors of North America, Inc. v. Mayor & Council of Wilmington*, 619 F. Supp. 29, 37 (D. Del. 1985). Even in *King v. Order of United Commercial Travelers*, 333 U.S. 153, 160-61 (1948), which held that a diversity court is not required uncritically to follow an unpublished decision of a state *nisi prius* court that "would not constitute a precedent in any other case in [the state courts]," this Court nevertheless observed that the court of appeals "properly attributed some weight to the [unpublished] decision." *Cf. Rowan Cos. v. United States*, 452 U.S. 247, 261 n.17 (1981); *Rose v. Hodges*, 423 U.S. 19, 21 n.3 (1975).

A federal court may be less sure than a state court of its understanding of state law. Unpublished state decisions are a valuable supplement to the materials otherwise at hand. State judges are likely to know how they and their colleagues have decided like cases, with or without a no-citation procedure. But adherence to a no-citation procedure in diversity would prevent the federal courts from knowing how legal disputes actually are resolved in state courts. This would directly frustrate the *Erie* objective of uniformity of outcome. In recognition of this fact, diversity courts have expressly declined to follow state no-citation procedures. *See Aviles v. Burgos*, 783 F.2d 270, 283 n.4 (1st Cir. 1986); *In re Schmelzer*, 480 F.2d 1074, 1076 n.1 (6th Cir. 1973).

The correct approach is that stated in *In re York*, 43 Bankr. 36, 37-38 n.1 (Bankr. M.D. Tenn. 1984) (emphasis in original):

> It is not necessary for us to determine whether this court is *bound* by the [unpublished] *Gourley* decision [of a lower Tennessee court]. We believe the *Gourley*

> decision is a reasonable interpretation of Tennessee law which is consistent with reported precedents. There is no reason to think that the Tennessee Supreme Court would hold differently if confronted with the issues presented here. Accordingly, we choose to follow the rationale of *Gourley* as indicative of Tennessee law.

Such an approach comports with and furthers the *Erie* objective of uniformity of outcome. It also conforms to the standard established by this Court in such cases as *Fidelity Union Trust* and *West*. It means that although a federal court sitting in diversity may not be bound by the unpublished decision of a state intermediate appellate court, just as it may not be bound by a published decision of the same court, it nevertheless must consider and should follow such a decision "in the absence of more convincing evidence of what the state law is." *Fidelity Union Trust*, 311 U.S. at 178.

Finally, consideration of the unpublished state decision is particularly appropriate here. If Paribas had not removed this case to federal court, the litigation would have proceeded in state court in parallel with *Kerr Construction*. The state trial and intermediate appellate courts presumably would have decided the case correctly under Texas law in conformity with the result in *Kerr Construction*. But if the case had been decided by the state intermediate court of appeals in a manner contrary to *Kerr Construction*, Exxon could have moved to consolidate the two cases in the Texas Supreme Court and asked that court to resolve the conflict. Nonpublication of one or both of the appellate court opinions would not have prevented the Texas Supreme Court from considering the two cases and opinions together and making an informed and uniform application of Texas law. Since the Texas Supreme Court could have looked to *Kerr Construction* in determining how to decide this case, it was wrong for the Fifth Circuit to refuse to do so.

2. *Application of state no-citation procedures also would conflict with other important federal interests*

i. *No-citation procedures clash with important jurisprudential values*

Procedural rules that forbid citation of unpublished judicial opinions clash with important jurisprudential values and disserve fundamental interests of the legal system. The heart of the problem is that such rules "interfere with responsible judicial decisionmaking by insulating a substantial portion of the court's product from the demands of stare decisis." W. Reynolds & W. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1200 (1978). "The development of 'hidden' precedents mocks the concept of stare decisis," W. Richman & W. Reynolds, *The [Ohio] Supreme Court Rules for the Reporting of Opinions: A Critique*, 46 Ohio St. L.J. 313, 314 (1985), and thus "renders the doctrine of *stare decisis* ineffective as a safeguard against unprincipled judicial decisionmaking." Report of the Subcommittee on Unpublished Opinions of the Advisory Committee on Procedures to the United States Court of Appeals for the District of Columbia Circuit 23 (May 1984) (hereinafter cited as "Subcommittee Report").[5]

The doctrine of *stare decisis* is

> the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986). No-citation procedures are "inconsistent with the doctrine of

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[5] Copies of the Subcommittee Report have been served upon opposing counsel and lodged with the Clerk of this Court.

stare decisis in a fundamental way." Subcommittee Report at 21. "[*S*]*tare decisis* cannot operate as a 'workable doctrine' as long as courts, while adjudicating sets of identical facts are able to reach directly contrary results on diametrically opposed legal theories, by the simple expedient of [not permitting citation of] one [or both] set[s] of results." G. Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 Cal. St. B.J. 386, 445 (1973).

A court's ability to invoke a no-citation procedure and thereby deny precedential value to its own decisions results in a "pernicious diminution in both judicial responsibility and judicial accountability." W. Reynolds & W. Richman, *supra*, 78 Colum. L. Rev. at 1199. "Decreased accountability in turn leads to both the perception and the possibility of inconsistent, arbitrary, and even biased decisions." W. Richman & W. Reynolds, *supra*, 46 Ohio St. L.J. at 315. By substituting *ad hoc* decision-making in place of the doctrine of *stare decisis*, no-citation procedures cause "confusion, repitition, nonuniformity, and even skepticism about the way [courts] do [their] job." *National Classification Committee v. United States*, 765 F.2d 164, 175 (D.C. Cir. 1985) (Wald, J., separate statement).

No-citation procedures "undermine one of the imperatives of an appellate system—that the system should promote uniform and coherent enunciation and application of the law." P. Carrington, D. Meador & M. Rosenberg, *Justice on Appeal* 38 (1976). The problem of nonuniformity is quite serious. When the doctrine of *stare decisis* breaks down, "no litigant can be certain that his case will be decided . . . in accordance with principles of law followed in other, similar cases." G. Kanner, *supra*, at 443. Nonuniformity of result means, very simply, "unfairness to litigants." D. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 Just. Sys. J. 405, 418 (1981). But it also represents the collapse of a "fundamental premise of the common law system of ad-

judication . . . that judges are required to decide like cases in like fashion." W. Richman & W. Reynolds, *supra*, 46 Ohio St. L.J. at 331. Moreover, the practice of issuing non-citable opinions "leave[s] the law in a state of irremediable disarray since it prevents counsel from calling attention to contradictory or chaotic decisions." D. Walther, *The Noncitation Rule and the Concept of Stare Decisis*, 61 Marq. L. Rev. 581, 589 (1978).

The resulting nonuniformity and unpredictability of outcome "impede[] client counseling, and may leave counsel groping in darkness." P. Wald, *The Problem with the Courts: Black-Robed Bureaucracy or Collegiality under Challenge?*, 42 Md. L. Rev. 766, 783 n.41 (1983). This adversely affects efforts at voluntary compliance. "Where the law is secret or where it is not founded in rational, enduring principles, there cannot be intelligent obedience." Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 38 U. Pitt. L. Rev. 309 (1977). In addition, by "spawning a body of secret law," *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting), the courts "undermine public trust in the judiciary." Subcommittee Report at 28. *Cf.* B. Cardozo, *Nature of the Judicial Process* 34 (1921) ("[a]dherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts").

Federal courts sitting in diversity need not and should not exacerbate these problems by adopting state no-citation procedures. Instead, the proper procedure in diversity is for the federal court to permit citation of an unpublished state decision, to consider the facts and the result in the state case, and (if the decision is by a lower state court) to assess whether the state supreme court would be likely to reach the same result. Only in this manner can a diversity court achieve the objectives of equal justice and uniformity of outcome that are shared both by *Erie* and the doctrine of *stare decisis*.

ii. *No-citation procedures are fraught with constitutional difficulties*

In prior cases, this Court has chosen to leave "to another day" the task of determining the validity of rules that forbid citation of unpublished judicial opinions. *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 258-59 n.1 (1978). *See also R&T Construction Co. v. St. Louis-San Francisco R. Co.*, 444 U.S. 941 (1979) (denying certiorari); *Do-Right Auto Sales v. United States Court of Appeals for the Seventh Circuit*, 429 U.S. 917 (1976) (denying leave to file petition for writ of mandamus or prohibition). That issue need not be decided here, either. The federal courts sitting in diversity are under no compulsion to follow state no-citation procedures, and for the reasons already discussed it would be inadvisable for them to do so. But if this Court otherwise were inclined to authorize the diversity courts to adopt such state procedures, the Court first would have to consider and resolve the substantial constitutional doubts that such procedures raise.

As prior restraints on what litigants or their counsel may say in court, no-citation procedures face a "heavy presumption against . . . constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), for they entail "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). No-citation rules are unlikely to pass muster under the standards that this Court has articulated in the past, *i.e.*, (1) that the restrained speech be shown to pose a serious and imminent threat to a protected competing interest, *Wood v. Georgia*, 370 U.S. 375, 383-85 (1962); (2) that the rule restraining speech be narrowly drawn, *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175, 183-84 (1968); and (3) that less restrictive alternatives not be available, *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 563.

Moreover, "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978). *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975). "There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig v. Harney*, 331 U.S. 367, 374 (1947). "It would be ironic indeed if an exception to the Constitution were to be recognized for the very institution[s] that ha[ve] the chief responsibility for protecting constitutional rights." *United States v. Grace*, 461 U.S. 171, 185 (1983) (Marshall, J., concurring in part and dissenting in part).

Prohibitions against citation of unpublished opinions not only curb speech, they do so in a manner that directly impairs the right to petition for redress of grievances, which is "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 519 (1972); *Edwards v. South Carolina*, 372 U.S. 229, 234-38 (1963). Just as states cannot "bar [persons] from resorting to the courts to vindicate their legal rights," *Brotherhood of R.R. Trainmen v. Virginia State Bar*, 377 U.S. 1, 7 (1964), they should not be able to muzzle the litigant once he gets to court.

Due process concerns also are implicated. "Due process requires that there be an opportunity to present every available defense." *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932). *See also, e.g., Holt v. Virginia*, 381 U.S. 131, 136 (1965); *Powell v. Alabama*, 287 U.S. 45, 69 (1932). In a case such as this, to bar Exxon from citing *Kerr Construction* would be "like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recog-

nized, and you shall not be heard." *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876). "Such a practice is irreconcilable with the command of the Due Process Clause." *Little v. Streater*, 452 U.S. 1, 12 (1981) (invalidating state statute that "forecloses what is potentially a conclusive means for [a party] to . . . exonerate himself"). Chief Judge Holloway recently voiced these concerns in dissenting, with two other judges, from the Tenth Circuit's adoption of a no-citation procedure:

> Each ruling, published or unpublished, involves the facts of a particular case and the application of law —constitutional, statutory or decisional—to the case. Therefore all rulings of this court are precedents, like it or not, and we cannot consign any of them to oblivion by merely banning their citation. No matter how insignificant a prior ruling might appear to us, any litigant who can point to a prior decision of the court and demonstrate that he is entitled to prevail under it should be able to do so as a matter of essential justice and fundamental fairness. To deny a litigant this right may well have overtones of a constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the rule.

28 U.S.C. 10th Cir. Rules, App. III (1988 Supp.) (citation omitted).

The problem arises not only because a litigant is foreclosed from citing favorable authority but also because the court places itself in a position where it can rely upon a body of secret law that the litigant is unable to address, distinguish, or criticize. *See* W. Reynolds & W. Richman, *supra*, 78 Colum. L. Rev. at 1196-99. This possibility is inconsistent with fundamental fairness:

> The validity and moral authority of a conclusion depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious

> loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

Finally, no-citation procedures are difficult to square with the constitutional guarantee of equal protection, that "'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Such procedures create the risk, as in this case, that essentially identical factual situations will be treated differently even though they are purportedly governed by the same substantive body of law. Moreover, in Texas, and presumably elsewhere, this risk is compounded by low publication rates and a "wide variation in the application of [publication] standards." F. Evans, J. Warren & L. Liberato, *To Publish or Not to Publish?*, 24 Houston Lawyer 18, 19 (July-Aug. 1986). In 1983 the publication rates among the Texas intermediate appellate courts ranged from a high of only 52 percent to a meager low of 13 percent. M. Osborn, *Publication of Opinions by the Texas Courts of Appeals*, 47 Tex. B.J. 655, 656 (June 1984). When so few opinions are published, the likelihood of unequal treatment is great. And when publication is apparently so random, a diversity court that looks only to published decisions will get an arbitrary and distorted view of state law—a view that, in turn, can lead to disparate results in state and federal courts and thereby defeat the overriding objective of *Erie*.

E. In The Alternative, This Court Should Certify The Underlying Issue Of State Law To The Texas Supreme Court

Especially in light of *Kerr Construction*, the underlying question of Texas law in this case admits of but a

single answer. If this Court concludes that *Kerr Construction* must be disregarded, however, it would be appropriate, in view of the Fifth Circuit's failure even to acknowledge the primacy of state law, to invoke Tex. R. App. P. 114(a), which provides that this Court and the federal courts of appeals may certify to the Texas Supreme Court "questions of law of this state which may be determinative of the cause then pending" in federal court.

Exxon asked the Fifth Circuit, as an alternative to reconsideration, to utilize this certification procedure "in order that the federal court might secure an authoritative construction of State law [and thereby furnish] a demonstration of cooperative judicial federalism." P. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 490 (1959). *See* J.A. 54. The Fifth Circuit refused to do so, but the option of certification remains open to this Court. "Such certification would further the *Erie* principle that federal courts should not make state law, and that state law applied in federal court should not differ from state-court state law." Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. Pa. L. Rev. 344, 362 (1963) (footnote omitted).

To be sure, use of a certification procedure "in a given case rests in the sound discretion of the federal court." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). Accordingly, this Court could, as it did in *Lehman Brothers*, remand to the court of appeals for reconsideration of the matter of certification. But where, as here, the court of appeals not only has refused to certify but also has exhibited an unwillingness to undertake the deep, patient, and probing analysis of state law that *Erie* requires, it would be entirely appropriate for this Court itself to certify the dispositive question of state law for decision by the Texas Supreme Court. *See Massachusetts v. Feeney*, 429 U.S. 66 (1976) (certifying question of

state law "on its own motion"); *Aldrich v. Aldrich*, 375 U.S. 249 (1963) (same).

CONCLUSION

The judgment of the court of appeals should be reversed. In the alternative, the judgment should be vacated and the case remanded for reconsideration in light of Texas law, including the decision in *Kerr Construction*, or the question of Texas law should be certified to the Texas Supreme Court.

Respectfully submitted,

Of Counsel:

W. J. MCANELLY, JR.
EDWARD DE LA GARZA
Exxon Company, U.S.A.
800 Bell Street
Houston, Texas 77002

KEITH A. JONES *
ROBERT A. BURGOYNE
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

J. RUFUS WALLINGFORD
C. MARK BAKER
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

* Counsel of Record

APPENDICES

APPENDIX A

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution in pertinent part provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Rules of Decision Act, 28 U.S.C. § 1652 (1982), provides:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Rules 90 and 114 of the Texas Rules of Appellate Procedure provide:

Rule 90. Opinions, Publication and Citation.

(a) Decision and Opinion. The court of appeals shall hand down a written opinion which shall be as brief as practicable but which shall address every issue raised and necessary to final disposition of the appeal. Where the issues are clearly settled, the court shall write a brief memorandum opinion which should not be published.

(b) Signing of Opinions. A majority of the justices participating in the decision of the case shall determine whether the opinion shall be signed by a justice or issued per curiam. The names of the justices participating in the decision shall be noted on all written opinions or orders handed down by a panel.

(c) Standards for Publication. An opinion by a court of appeals shall be published only if, in the judgment of a majority of the justices participating in the decision, it is one that (1) establishes a new rule or law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (2) involves a legal issue of continuing public interest; (3) criticizes existing law; or (4) resolves an apparent conflict of authority.

(d) Concurring and Dissenting Opinions. Any justice may file an opinion concurring in or dissent-

ing from the decision of the court of appeals. A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in paragraph (c), but in such event the majority opinion shall be published as well.

(e) Determination to Publish. A majority of the justices participating in the decision of a case shall determine, prior to the time it is issued, whether an opinion meets the criteria for publishing, and if it does not meet the criteria for publication, the opinion shall be distributed only to the persons specified in Rule 91, but a copy may be furnished to any interested person. On each opinion a notation shall be made to "publish" or "do not publish."

(f) Rehearing. If a rehearing is granted, no opinion shall be published until after the decision on rehearing is issued.

(g) Action of Court En Banc. The court en banc may modify or overrule a panel's decision with regard to the signing or publication of the panel's opinion or opinions in a particular case. A majority of justices shall determine whether written opinions handed down by the court en banc shall be signed by a justice or issued per curiam, and whether they shall be published.

(h) Order of the Supreme Court. Upon the grant or refusal of an application for writ of error, whether by outright refusal or by refusal no reversible error, an opinion previously unpublished shall forthwith be released for publication, if the Supreme Court so orders.

(i) Unpublished Opinions. Unpublished Opinions shall not be cited as authority by counsel or by a court.

Rule 114. Certification of Questions of Law by United States Courts

(a) Certification of Questions of Law. The Supreme Court of Texas may answer questions of law certified to it by the Supreme Court of the United States or a Court of Appeals of the United States when requested by the certifying court, if there are involved in any proceedings before the certifying court questions of law of this state which may be determinative of the cause then pending and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Supreme Court of Texas. The Supreme Court may, in its discretion, decline to answer the questions certified to it.

(b) Contents of the Certification Order. A certification order shall set forth:

(1) The questions of law to be answered;

(2) A stipulated statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

(3) The names of each party to the pending cause.

(4) The names and addresses of counsel for each party.

(c) Preparation of Certification Order. The certification order shall be prepared by the certifying court and forwarded to the Supreme Court of Texas by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or any portion of the record before the certifying court to be filed under the certification order, if in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(d) Fees and Costs. Fees and costs shall be the same as in direct appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

(e) Briefs and Oral Argument. Upon the agreement of the Supreme Court to answer the questions certified to it, notice shall be given to all parties. The appealing party in the certifying court shall file his brief with the clerk of the Supreme Court within thirty days from the date of receipt of the notice and the opposing parties shall file an answering brief within fifteen days of service of copies of the opening brief. Briefs shall be in the manner and form of Rules 131 and 136, Texas Rules of Appellate Procedure, so far as reasonably applicable. Oral argument may be granted upon application or ordered by this court. If granted or ordered, argument shall be as provided in Rule 172, Texas Rules of Appellate Procedure.

(f) Notice to the Attorney General. When the constitutionality of a Texas statute is the subject of a certified question to which the State of Texas or an officer, agency or employee of the state is not a party, the clerk of the Supreme Court shall notify the Attorney General and shall permit the State of Texas to intervene for presentation of briefs and oral argument on the question of constitutionality.

(g) The Answer to the Certified Question. After all motions for rehearing have been overruled, the written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

(h) All time limits shall be in accordance with the Texas Rules of Appellate Procedure, so far as reasonably applicable.

APPENDIX B

IN THE SUPREME COURT OF TEXAS

April 27, 1988

No. C-7185

THE PLAINS NATIONAL BANK OF LUBBOCK

vs.

KERR CONSTRUCTION COMPANY *et al.*

From Lubbock County, Seventh District

Application of petitioner for writ of error to the Court of Appeals for the Seventh District, together with amicus curiae's, Exxon Company, U.S.A., motion to publish and motion to supplement the motion to publish and brief previously filed by amicus curiae Exxon Company, U.S.A., having been duly considered, it is ordered that said motion to supplement the motion to publish be granted, and that the motion to publish, as supplemented, be, and hereby is, overruled, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, The Plains National Bank of Lubbock, pay all costs incurred on this application.